GRANTED

ORIGINAL

No. 99-8268

FILED

JAN 7 2000

CLERK

IN THE SUPREME COURT OF THE UNITED STATES

LARRY LEE KILLS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY FOR THE UNITED STATES IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record

JAMES K. ROBINSON
Assistant Attorney General

PAUL C. ZAPATA
Attorney

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the use of thermal imaging to record the amount of heat emanating from a house constitutes a "search" within the meaning of the Fourth Amendment.

IN THE SUPREME COURT OF THE UNITED STATES

No. 99-8508

DANNY LEE KYLLO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 190 F.3d 1041.

JURISDICTION

The judgment of the court of appeals was entered on September 9, 1999. A petition for rehearing was denied on December 14, 1999. Pet. App. B. The petition for a writ of certiorari was filed on March 7, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a conditional guilty plea in the United States District Court for the District of Oregon, petitioner was convicted on one count of manufacturing marijuana, in violation of 21 U.S.C.

841(a)(1). Petitioner was sentenced to 63 months' imprisonment. The court of appeals vacated and remanded for a hearing on petitioner's motion to suppress. After an evidentiary hearing, the district court denied petitioner's motion to suppress. The court of appeals reversed. On rehearing, the court of appeals affirmed.

1. During the course of an investigation into a possible conspiracy to grow and distribute marijuana in Oregon, William Elliott, an agent of the United States Bureau of Land Management, began to suspect that petitioner was a participant in the conspiracy. Pet. App. A1043. Elliot learned from state law enforcement officers that petitioner's wife had recently been arrested for delivery of a controlled substance and that petitioner had once told a government informant that he could supply marijuana. Ibid. By examining petitioner's utility records, Elliot also determined that petitioner used an abnormally high amount of electricity. Ibid.

Elliott then asked Daniel Haas, a Staff Sergeant from the Oregon National Guard, to take a thermal image reading of petitioner's house. Pet. App. A1044. While seated in a parked car on a public street, Haas used an AGEMA Thermovision 210 thermal imagining device (thermal imager) to scan the triplex where petitioner lived. Id. at A1044. A thermal imager detects and records heat patterns. Ibid. When pointed at the outside surface of a house, it detects the heat transmitted to that surface. Ibid. It then translates the information into a visual image, with warmer areas appearing as white dots. Ibid.

After surveying petitioner's house with the imager, Haas concluded that abnormally high levels of heat were emanating from the roof of petitioner's garage and one wall of his house. Pet. App. A1044. Haas also concluded that petitioner's house emitted more heat than neighboring houses. Ibid. Putting the information supplied by Haas together with the information he had already collected, Special Agent Elliot concluded that petitioner was using high intensity lights to grow marijuana in his house. Ibid. Based on the information supplied by Elliot, a federal magistrate judge issued a warrant authorizing a search of petitioner's house. Ibid. Upon executing the warrant, agents discovered an indoor marijuana growing operation, firearms, and drug paraphernalia. Ibid.

2. Petitioner was indicted on one count of manufacturing marijuana, in violation of 21 U.S.C. 841(a)(1). Petitioner moved to suppress the evidence recovered from his residence, arguing that the use of a thermal imagining device constituted an impermissible search. Finding that the use of the thermal imager did not constitute a search of petitioner's house, the district court denied petitioner's motion. Pet. App. G. Petitioner entered a conditional plea of guilty and appealed the district court's suppression ruling. The court of appeals vacated petitioner's sentence and remanded the case to the district court to hold an evidentiary hearing on the capabilities of the thermal imaging device that Sergeant Haas had used. Pet. App. F.

3. After holding an evidentiary hearing, the district court again denied petitioner's motion to suppress. Pet. App. H. The

court found that the device recorded only the heat being emitted from the house, and that it could not penetrate walls or windows or reveal human activities. Id. at H3-H4. Based on those findings, the district court concluded that the use of the imager did not constitute a search. Id. at H4.

4. The court of appeals reversed and remanded. Pet. App. E. On rehearing, however, the court of appeals affirmed. Pet. App. A. In analyzing whether the use of the thermal imager constituted a search, the court applied a two-part test drawn from this Court's decisions. Id. at A1045. That test requires a person claiming a violation of the Fourth Amendment to show both that (1) the investigative practice at issue intrudes on an actual subjective expectation of privacy and (2) the expectation is one that society recognizes as objectively reasonable. Ibid. The court held that petitioner had failed to satisfy either the subjective or the objective component of that test. Id. at A1046-A1047.

The court concluded that petitioner failed to satisfy the subjective component, because the imager detected only heat emissions, and petitioner had not manifested a subjective expectation of privacy in those emissions. Pet. App. A1046. The court concluded that petitioner failed to satisfy the objective component, because activities within a residence are not protected from outside, non-intrusive government observation, the use of technology to enhance such observations does not transform the government practice into a search unless the technology reveals intimate details, and the imager in this case revealed only

amorphous hot spots, not intimate details. Id. at A1046-A1047.

ARGUMENT

Petitioner contends (Pet. 6-21) that the use of thermal imaging to detect the amount of heat emanating from his house constituted a search within the meaning of the Fourth Amendment. That contention is without merit and does not warrant review in this case.

1. This Court has established a two-part test to determine whether an individual has a constitutionally protected expectation of privacy: "[F]irst, has the individual manifested a subjective expectation of privacy in the object of the challenged search? Second, is society willing to recognize that expectation as reasonable?" California v. Ciraolo, 476 U.S. 207, 211 (1986); see also Bond v. United States, 120 S. Ct. 1462, 1465 (2000). Petitioner failed to satisfied either component of that two-part test.

a. Petitioner failed to satisfy the subjective component of the test, because he did not manifest a subjective expectation of privacy in the heat emitted from his house. As the court of appeals explained, petitioner "made no attempt to conceal these emissions, demonstrating a lack of concern with the heat emitted and a lack of subjective privacy expectation in the heat." Pet. App. A1046.

Petitioner does not claim that he manifested a subjective expectation of privacy in the heat leaving his house. Instead, he contends (Pet. 8-11) that he manifested a subjective expectation of

privacy in the activities occurring within his house and that the thermal imager interfered with that subjective expectation. As the court of appeals explained, however, the thermal imager used in this case detected only differential heat loss; it did not detect any specific activities occurring within petitioner's house. Pet. App. A1046-A1047. The court of appeals therefore correctly focused on whether petitioner manifested a subjected expectation of privacy in the heat emitted from his house, rather than on whether petitioner manifested a subjective expectation of privacy in the activities occurring within his house. Since petitioner did not manifest a subjective expectation of privacy in the heat emitted from his house, the use of the imager to detect that heat loss did not constitute a search within the meaning of the Fourth Amendment.

b. Even assuming petitioner had a subjective expectation of privacy in the heat escaping from his house, that expectation is not one that society is prepared to recognize as reasonable. Several considerations are significant. First, the government officials in this case did not enter petitioner's house or curtilage; they made their observations from a public street. Pet. App. A1044. Second, the imager did not send intrusive beams or rays into petitioner's house; it passively detected and recorded heat that escaped from the house. Pet. App. A1044. Third, the imager did not visually display any specific activities occurring within petitioner's house; it displayed only amorphous hot spots. Id. at A1047. Finally, the imager did not incorporate sophisticated technology unavailable to the general public; thermal

imagers are commercially available and used by businesses for a variety of purposes, including the detection of roof leaks, overloaded power lines, and faulty insulation. Id. at A1044 n.4.

In those circumstances, the use of the imager in this case did not intrude on any expectation of privacy that society is prepared to recognize as reasonable. Numerous decisions of this Court support that conclusion. See Dow Chemical Co. v. United States, 476 U.S. 227, 238-239 (1986) (use of precise mapping camera to identify outline of a facility's building and equipment does not constitute a search); California v. Ciraolo, 476 U.S. 209, 213-215 (1986) (observation of area within the curtilage of a house from public navigable airspace does not constitute a search); United States v. Place, 462 U.S. 696, 707 (1983) (use of trained police dog to sniff for contraband contained inside a closed bag does not constitute a search); Smith v. Maryland, 442 U.S. 735 (1979) (use of pen register to determine phone numbers called from a private residence does not constitute a search); Air Pollution Variance Bd. v. W. Alfalfa Corp., 416 U.S. 861, 865 (1974) (observation of smoke emitted from a chimney to determine its opacity does not constitute a search).

2. The decision below does not conflict with the decision of any other court of appeals. Like the court of appeals in this case, the Fifth, Seventh, Eighth, and Eleventh Circuits have all held that the use of a thermal imager does not constitute a search within the meaning of the Fourteenth Amendment. United States v. Ishmael, 48 F.3d 850, 855-857 (5th Cir.), cert. denied, 516 U.S.

818 (1995); United States v. Myers, 46 F.3d 668, 669-670 (7th Cir.), cert. denied, 516 U.S. 879 (1995); United States v. Pinson, 24 F.3d 1056, 1058-1059 (8th Cir.), cert. denied, 513 U.S. 1057 (1994); United States v. Robinson, 62 F.3d 1325, 1328-1330 (11th Cir. 1995), cert. denied, 517 U.S. 1220 (1996). Consistent with the decision below, those courts have reasoned that persons do not have a reasonable expectation of privacy in the heat escaping through the walls of their houses. Ibid.

A panel of the Tenth Circuit held that the use of a thermal imager constitutes a search. The Tenth Circuit, however, vacated the panel's decision and granted rehearing en banc. On rehearing en banc, the court held that the warrant at issue in that case was supported by probable cause even absent consideration of the results of the thermal scan. The court therefore did not find it necessary to decide whether the use of a thermal imager constitutes a search. United States v. Cusumano, 83 F.3d 1247, 1250 (1996). Thus, all the federal circuits that have addressed the question have concluded that the use of a thermal imager does not constitute a search.

3. Petitioner contends (Pet. 8-9) that the decision below conflicts with United States v. Karo, 468 U.S. 705 (1984), and Katz v. United States, 389 U.S. 347 (1967). Petitioner's reliance on those decisions is misplaced. In Karo, the Court held that the government's use of a beeper to determine that an ether can was inside a house constituted a search within the meaning of the Fourth Amendment. 468 U.S. at 714-718. In that case, however, the

beeper physically entered the house, and it revealed that a specific item was inside the house. Ibid. In contrast, the thermal imager used in this case never entered petitioner's house, and the imager detected only amorphous hot spots. Karo is therefore inapposite here.

In Katz, the Court held that the government conducted a search and seizure when it used an electronic device attached to a phone booth to record and listen to the conversations of a person in the booth. 389 U.S. at 352-353. The Court reasoned that a person who enters a telephone booth and shuts the door behind him manifests a reasonable expectation that his conversations will remain private, and that recording a person's private conversations intrudes deeply into personal privacy. Ibid. The situation here is entirely different. Petitioner took no affirmative step to shield the emission of heat from his house, and the imager did not detect any private details of petitioner's life. The decision in Katz therefore does not assist petitioner here.

4. Finally, petitioner errs in contending (Pet. 6-7) that review is warranted to resolve a conflict between the decision below and three state supreme court decisions. In State of Montana v. Siegal, 934 P.2d 176, 183, 190-191 (1997), the Supreme Court of Montana held that the use of thermal imagining without a warrant violates Article II, Section 11 of the state constitution, which provides that "[t]he right of individual privacy * * * shall not be infringed without the showing of a compelling state interest." The court emphasized that Article II, Section 11 is a "unique"

provision that "affords citizens broader protection at the hands of the government in search and seizure cases than does the Federal Constitution." Id. at 183. The court did not address whether the use of a thermal imager constitutes a search within the meaning of the Fourth Amendment.

Similarly, in State of Washington v. Young, 867 P.2d 593, 596-601 (1994), the Supreme Court of Washington held that the use of a thermal imager without a warrant violates Article I, Section 7 of the state constitution, which provides that "no person shall be disturbed in his private affairs, or his home invaded without authority of law." The court stressed that Article I, Section 7 affords "more rigorous protection of privacy rights than those guaranteed by the Fourth Amendment." Id. at 596. While the Supreme Court of Washington went on to find that the use of a thermal imager without a warrant violates the Fourth Amendment, it did so solely "for the purpose of providing guidance to other courts on the subject of sense-enhanced surveillance of a home." Id. at 601.

Thus, Siegal and Young both rest on interpretations of state constitutional provisions that place greater restrictions on government investigative activity than the Fourth Amendment. Those state constitutional decisions do not conflict with the decision of the court below.

That leaves only the decision of the Supreme Court of Pennsylvania in Commonwealth v. Gindlesperger, 743 A.2d 898 (1999) (petition for certiorari pending, No. 99-1553). In that case, the

court held that the use of a thermal imager without a warrant violates the Fourth Amendment. The decision in that case therefore conflicts with the decision below. As we have noted, however, the decision below is consistent with the decision of every federal court of appeals that has considered the question, and those decisions correctly interpret this Court's Fourth Amendment cases. The contrary holding of a single state supreme court does not provide a sufficient basis for granting review in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

JAMES K. ROBINSON
Assistant Attorney General

JUAN C. ZARATE
Attorney

JUNE 2000

IN THE SUPREME COURT OF THE UNITED STATES

KYLLO, DANNY LEE
Petitioner

vs.

USA

No. 99-8508

CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served copies of the **BRIEF FOR THE UNITED STATES IN OPPOSITION** by first class mail, postage prepaid, on this 7th day of June 2000.

KENNETH LERNER
851 S.W. SIXTH AVE.
SUITE 1600
PORTLAND, OR 97204

Seth P. Waxman/a

SETH P. WAXMAN
Solicitor General
Counsel of Record

June 7, 2000